STATE OF ALASKA ET AL.

IBLA 93-114 Decided January 6, 1997

Appeal from a decision of the Alaska State Office, Bureau of Land Management, declining to reserve certain easements incidental to approval of interim conveyance for village selections F-14956-A2 and F-14956-B2.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Public Easements--Alaska Native Claims Settlement Act: Easements: Access

BLM properly refused to reserve easements for an air field and a service trail thereto in the absence of proof there was public use of the field for access to public lands prior to 1976 or that access to public lands or waters would be denied by refusal to reserve the easements.

APPEARANCES: Nancy J. Nolan, Esq., Assistant Attorney General, for the State of Alaska; David B. Thomas, Esq., for Brigham Young University, Provo, Utah; Thomas S. Sparks, Resource Development Specialist, for Bering Straits Native Corporation; Joseph Darnell, Esq., Office of the Regional Solicitor, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska and Brigham Young University (BYU) have appealed from a November 10, 1992, decision of the Alaska State Office, Bureau of Land Management (BLM), that approved, in part, an interim conveyance of about 12,727 acres of land to the White Mountain Native Corporation on behalf of the Native Village of White Mountain, pursuant to section 14(a) of the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(a) (1994). In the decision, BLM reserved two trail easements across the village selection, but declined to reserve a proposed airstrip easement and two connecting service trail easements running north and south from the airstrip. The area in question comprises a strip of coastal land on Norton Sound near Bluff, Alaska, a rural location east of Nome.

In a statement of reasons (SOR) filed by the State in which BYU has joined, appellants challenge BLM's determination not to reserve to the

United States two proposed public easements, EIN 14 C3 D1 D9 (EIN 14) and EIN 14a C3 D1 D9 (EIN 14a), under section 17(b) of ANCSA, as amended, 43 U.S.C. § 1616(b) (1976). As proposed, EIN 14 would reserve an airstrip easement 100 feet wide and 2,000 feet long in sec. 25, T. 10 S., R. 26 W., Kateel River Meridian. Proposed EIN 14a would provide an easement 50 feet wide for an existing access trail running south from the airstrip and leading to trail easement EIN 3 C1 D1 L M (EIN 3) and public lands in the same township.

The decision here under review reserved two trail easements. Easement EIN 3 is a 50-foot trail running easterly along the coast across the conveyed land to public lands. Easement EIN 100 D1, C5 (EIN 100) is also a 50-foot trail that runs from EIN 3 in a northeasterly direction to public uplands. In a notice issued November 18, 1991, BLM indicated that reservation of a proposed airstrip easement designated EIN 14 was considered but not recommended for reservation because it did not provide access to public lands. Similarly, a service trail (EIN 14a) running south from the airstrip to approved trail easement EIN 3, was not recommended because it, like EIN 14, would provide access primarily to private land. See Notice dated Nov. 18, 1991, at 3. These two rejected transportation easements are the subject of this appeal; that part of BLM's decision declining to reserve another trail easement running north from the airstrip was not appealed.

A March 27, 1992, BLM memorandum explains why the airstrip easement was not reserved:

> This existing airstrip was not recommended [for reservation from the conveyance to White Mountain Native Corporation] because there is no present significant use of the airstrip to provide access to public lands. Present existing use is limited to providing access to either the lands being conveyed, or the patented mineral surveys at Bluff. There has been a flurry of interest and activity the past few years in the mineral potential of the lands being conveyed. It is known that BHP Utah International, Utah International Inc., Alaska Pioneer Placer (Pettigrews), Coal-Facts, Ltd, Brigham Young University, and others have used the airstrip and trail * * * and an extension to access the patented mining claims at Bluff, as well as Eldorado Creek and other lands being conveyed. There is no evidence that there has been significant use by these or other parties to access public lands outside the conveyance area.
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> Birdwatchers and the U.S. Fish and Wildlife Service use the airstrip to access a cabin on lands being conveyed at the mouth of Koyana Creek. Since the cabin site will be conveyed out of public ownership, it is not possible to reserve an easement for access to this site.
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> Theoretically the airstrip could provide access to public lands via connecting trail easements [mentioned above]; in reality the major use would be to provide access to private lands and lands being conveyed. The mineral surveys do not qualify as a group of inholdings sufficient in number to constitute a public use because they are all owned by one entity. [Emphasis in original.]

(SOR Exh. 6 at 3).

Concerning EIN 14a, the proposed service trail for the airstrip that would run south to intersect approved trail EIN 3, BLM's March 27, 1992, memorandum found that it, too, should not be reserved from the conveyance to White Mountain because:

> There is a network of parallel trails between [the proposed] airstrip [easement] * * * and patented mineral surveys at Bluff. This easement [EIN 14a] was proposed to provide access between [the] airstrip * * * and public lands via trails [EIN 3 and EIN 100]. It is not recommended because the airstrip and associated trails primarily provide access to private land.

(SOR Exh. 6 at 3).

Because they did not appeal BLM's decision not to reserve a proposed trail easement running north from the airstrip to public uplands, it is apparent that appellants are primarily interested in access to coastal land lying south of the airstrip along Norton Sound. The joint SOR filed by appellants explains that the land to which access is sought is "within T. 10 and 11 S., R. 26 W., of the Kateel River Meridian inland from the marine coastline of Norton Sound near Bluff, Alaska, in the southern half of the Seward Peninsula." Id. at 4. It is principally the "marine coastline" that appellants want to use. Id. at 5. The coastal land is identified as a place where mining exploration is being prosecuted by "Greatland Exploration, Ltd. and Auric Offshore Mining Co. [companies that] hold State permits for offshore prospecting in the area." Further, the SOR avers that BLM erred by failing to consider "use of the airstrip and trail for access to the marine coastline," in view of the fact "the airstrip and associated trail are used by Greatland Exploration, Ltd., and Auric Offshore Mining in order to reach their offshore operations in the region." Id. at 7.

The SOR argues that "air access is the only feasible means of reaching the public lands and marine coastline in this [coastal] region." Id. at 9. Maps furnished as exhibits to the SOR establish that the area to which access is sought lies next to Norton Sound, along the portion of the coastline approved for conveyance to White Mountain. See SOR Exh. 3 at 3, and SOR Exh. 4 at 2. An affidavit from the president of Auric Offshore Mining Company explains that "[i]f we did not have access to the Bluff [air]strip, we would be forced to transport supplies, equipment and personnel approximately 50 miles by boat from Nome" (SOR Exh. 3 at 2).

An affidavit by the president of Greatland Exploration Ltd. confirms that "[i]f the [air]strip at Bluff were not open to public access, Greatland would be forced to transport employees, equipment and supplies by tug or barge from Nome. This would result in a tremendous increase in transportation costs" (SOR Exh. 4 at 1).

Further, the SOR notes that BYU "holds title to nine patented mining claims within the block of land conveyed to White Mountain; these claims total approximately 520 acres of land." It is argued that the air field is needed to provide public access to those claims. It is said that other members of the general public have also used lands in the area of the claims for recreational and mining purposes" (SOR at 6). Appellants contend the air field provides access for birdwatchers and hunters in addition to providing a staging area for mining operations (SOR at 6; SOR Exh. 2). Affidavits by pilots James D. Rowe and Donald Olson are offered to show use of the air field for such uses (SOR Exhs. 1 and 2). Rowe states he used the airstrip beginning in 1979 for such purposes, making approximately 12 landings there in 1993, 40 landings in 1992, and 40 landings in 1991 (SOR Exhs. 1 at 2). Olson avers that he began to fly into the strip for similar flights "about 1970," transporting passengers on numerous occasions, one of which occurred in about 1984 ("about 10 years ago") (SOR Exh. 2 at 3).

Appellants conclude that, because the conveyance to White Mountain will isolate publicly owned lands from public access, the BLM decision should be set aside and the case file remanded with instructions to reserve the easements in question, or, alternatively, that the decision should be remanded for development of a more complete record, including public testimony, concerning a continued need for use of the air field and its service trail at Bluff.

Reservation of public transportation easements from conveyances of land to Native corporations is authorized under ANCSA section 17(b), 43 U.S.C. § 1616(b) (1976), subject to principles laid down by section 903 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1633(a) (1994). ANILCA provides that such easements "should be designed so as to minimize their impact on Native life styles" and "should include only such areas as are necessary for the purpose or purposes for which the easement is reserved."

Implementing Departmental regulations establish that reservations of such public easements by BLM shall be limited to those "reasonably necessary to guarantee access to publicly owned lands or major waterways and the other public uses which are contained in these regulations." 43 CFR 2650.4-7(a). "Publicly owned lands" are defined as "Federal, State, or municipal corporation (including borough) lands or interests therein in Alaska." 43 CFR 2650.0-5(r). Public easements for transportation may be reserved across lands conveyed to Native corporations "for transportation purposes which are reasonably necessary to guarantee the public's ability

to reach publicly owned lands or major waterways." 43 CFR 2650.47(b)(1). Such easements may be reserved "only if there is no reasonable alternative route" (id. at (i)) and provided they are "not duplicative of one another." Id. at (ii). Whether a use is reasonably necessary, as required by these rules, is determined by examining present existing use. 43 CFR 2650.4-7(a)(3). "Present existing use" is defined as "use by either the general public which includes both Natives and non-Natives alike or by a Federal, State, or municipal corporation entity on or before December 18, 1976." 43 CFR 2650.0-5(p).

[1] The record does not provide support for the principal argument made by appellants, that failure to reserve an air field easement will isolate the marine coastline of Norton Sound so as to prevent access to public lands. The lands conveyed to White Mountain comprise a block of land running seven miles along the coast of Norton Sound. See SOR Exh. 5. The public lands to which access is primarily sought are found under the waters of the Sound itself, that area being the exploration target of the mining companies whose officers provided affidavits in support of the SOR. Access to the Sound may be had, therefore, by land from either end of the grant to White Mountain, as well as from Norton Sound itself. As the affidavits provided by the two miners demonstrate, while both companies prefer to use airplanes to explore their prospects in Norton Sound, neither excludes other transportation methods, including boats, for that purpose. Although both companies agree that it would be cheaper to use the air field at Bluff to stage their exploration of the Sound, neither of them has provided a statement of the exact costs for such transportation as they have incurred, or are likely to incur, using aircraft or any other means of transport. We have only their assertion that air transport (which may not be exclusive of other means) is presently their preferred means of travel. No evidence has been offered to show that the acknowledged alternative sea route from Nome would be unreasonable or would make exploration impossible. See, e.g., Chitina Native Corp., 85 IBLA 311, 333 (1985) (land accessible by water was not deprived of access by Native selection).

Nor do the other uses of the air field described by the SOR indicate error in BLM's decision. The uses described by Rowe's affidavit all occurred after December 1976, and are not, therefore, presently existing uses within the meaning of 43 CFR 2650.0-5(p) so as to qualify for consideration in this case. See, e.g., City of Tanana, Tozitna, Ltd., 98 IBLA 378, 382 (1987). Assuming, however, that some of the air traffic described by Rowe and Olson took place before 1976, the record shows that the patented mining claims relied upon by the SOR to support a claimed need for access are held by a single owner. See SOR Exh. 6 at 3. Being in single ownership, the claims do not constitute public use so as to form a basis for reservation of a public transportation easement under 43 CFR 2650.4-7(b) for "groups of private holdings sufficient in number to constitute a public use." While it is alleged that others may have used the claims, it does not appear that they were owners; they are not further identified by appellants, nor is the nature and exact location of their usage described.

Similarly, transportation of hunters and birdwatchers to the Bluff landing field does not demonstrate the existence of a qualifying use of the air field, regardless when the transportation was made, inasmuch as those persons apparently travelled to the air field to use the landing site itself, or else used lands immediately adjacent to the field, within the land scheduled for conveyance to White Mountain, for their recreational purposes. The regulations, however, expressly prohibit reservation of site easements for such purposes from conveyances to Native corporations: Departmental regulation 43 CFR 2650.4-7(a)(7) provides that: "Scenic easements or easements for recreation on lands conveyed pursuant to [ANCSA] shall not be reserved. Nor shall public easements be reserved to hunt or fish from or on lands conveyed pursuant to [ANCSA]."

The evidence offered by appellants does not show that the hunters and birdwatchers brought in or taken out by Rowe and Olson used the airfield to obtain access to public lands other than the land now planned for conveyance to White Mountain. The record indicates the activity took place near the air field, on lands presently to be conveyed to White Mountain, or at the water's edge, also on land to be conveyed. Such use does not provide a foundation for reservation of a public transportation easement by BLM. See 43 CFR 2650.4-7(a)(7).

The burden of proving that a BLM easement decision is in error rests with the parties challenging it. Tetlin Native Corp., 86 IBLA 325, 335 (1985). That showing can be accomplished by showing that BLM's action was not consistent with statutory and regulatory principles established for reservation of easements in conveyances to Native corporations. Id. Such a showing has not been made here. On the contrary, the record indicates that the easements sought by appellants would only duplicate approved trail easements reserved by BLM from the White Mountain conveyance to provide continued public access to public lands. While the air field has been used in the past, it has not been shown that such prior use was for access to public lands by the general public prior to 1976, nor has it been shown that access to Norton Sound mineral prospects will be isolated by the White Mountain conveyance.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge